BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMIE VICK	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,033,888
	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 1, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh. Dennis L. Horner, of Kansas City, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to prove that she injured her back as a direct and natural consequence of her work-related knee injury. Accordingly, claimant's request for medical treatment of her back was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 30, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues the ALJ erred in determining that she did not suffer an injury to her back that was a direct and natural consequence of her original work-related injury to her left knee.

Respondent contends that the Board does not have jurisdiction over the issue in this appeal.

The issues for the Board's review are:

(1) Does the Board have jurisdiction of the issue in this appeal?

(2) If so, does the evidence in the record show that claimant suffered an injury to her back as a direct and natural consequence of her original work-related injury to her left knee?

FINDINGS OF FACT

Claimant is employed by respondent as a mental health technician at the Osawatomie State Hospital. On September 9, 2006, claimant was assisting in restraining a patient when she fell and landed on her left knee. She did not receive any treatment from that accident. On February 1, 2007, she was dealing with a combative patient who knocked her down. She landed on her head and left knee. She sought treatment for that injury. She underwent two surgeries on her left knee. Neither surgery gave her any relief.

Claimant was referred to Dr. Daniel Stechschulte, who performed a third surgery on her left knee on May 19, 2008, at the Kansas City Orthopedic Institute. After the surgery, the nurses assisted her to the restroom. They left her alone in the restroom, and she sat down. When she tried to stand back up, her legs gave way and she fell. Her back landed on the rim of the toilet, and she also injured her right wrist. The nurses heard her fall and came right back to the restroom. Claimant told the nurses that her wrist and back were hurt. Claimant did not receive any treatment for her back and testified that the nurses told her to wait to see what her pain would be later. No one from the hospital asked her to fill out a report on the fall.[1]

Kyle Bledsoe, a friend of claimant, corroborated her testimony that she fell while in the bathroom during her May 2008 hospitalization. He testified that he overheard claimant tell the nurses that she fell and hit her head and back and that her back was hurting.

Claimant was in the hospital about three days. She was seen by Dr. Stechschulte while she was still in the hospital. She testified that she told Dr. Stechschulte about her fall in the restroom and that the nurses had told her to wait before doing anything about her back. Dr. Stechschulte agreed with the nurses and told claimant to let him know if she was still having pain at her follow-up appointment.

Claimant discussed her back pain with Dr. Stechschulte during her follow up appointments. She testified that he told her the reason for her back pain could be the change in her gait as a result of her surgeries. He did not want to give her any treatment

[1] None of the records from claimant's hospitalization at the Kansas City Orthopedic Institute were made a part of the record in this case.

for her back. Claimant stated that she did have an altered gait from February 1, 2007, through the time she was seeing Dr. Stechschulte.

Claimant was seen by Dr. John Pazell on December 17, 2008, at the request of claimant's attorney. Claimant told him her major complaints regarded her left knee. Dr. Pazell's report does not mention that claimant gave a history of a fall in May 2008. His report indicates that claimant complained of problems with her spine that she attributed to her change in gait. He recommended that claimant be evaluated for her spine problem.

Claimant was seen by Dr. Vito Carabetta on February 12, 2009. Her chief complaint was low back pain. She told Dr. Carabetta that her back pain began following her fall in May 2008. Dr. Carabetta's report notes that in his review of the hospital records, he did not find any mention of claimant's back, but the records did document her right wrist pain incurred in her fall at the hospital. Dr. Carabetta opined that further evaluation and treatment of claimant's back would be appropriate, but because claimant was pregnant at the time of his examination, he noted that any diagnostic work-up would need to be delayed until after she had delivered her child.

Dr. Carabetta did not believe that claimant's back problems were a result of an altered gait. Although he stated the hospital records were devoid of any mention of claimant's back, he stated:

> The question of causation, as presented by the patient, would suggest that the onset of the back pain would be a complication of the event that occurred, namely the slip and fall in the bathroom, and this would be related to her original knee problems.[2]

PRINCIPLES OF LAW AND ANALYSIS

(1) Does the Board have jurisdiction of the issue in this appeal?

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 44-551.

The Board has jurisdiction to review the ALJ's finding that claimant's back injury is not compensable because the basis of his denial of compensation is that claimant failed

[2] P.H. Trans., Cl. Ex. 2 at 4.

to prove her back injury resulted from an accident that arose out of and in the course of her employment with respondent.

(2) Does the evidence in the record show that claimant suffered an injury to her back that was a direct and natural consequence of her original work-related injury to her left knee?

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

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[3] K.S.A. 2009 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[5] *Id.* at 278.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[6] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[7] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[8] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[9] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury,

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[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[7] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[10]

In *Logsdon*,[11] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

Finally, in *Casco*,[12] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

Claimant's current back condition is either the result of an altered gait resulting from her compensable work-related knee injury or it is the result of a fall claimant suffered while in the hospital after undergoing surgery for that knee injury, or it is a combination of the two. Regardless, claimant's back condition is compensable as a direct consequence of her compensable knee injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

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[10] *Id.* at 728.

[11] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

[12] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[13] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2009 Supp. 44-555c(k).

CONCLUSION

(1) The Board has jurisdiction of the issue in this appeal.

(2) Claimant suffered injury to her back as a direct consequence of her original work-related injury to her left knee.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 1, 2009, is reversed and remanded to the ALJ for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge